

REMARKS

This Amendment is submitted in reply to the non-final Office Action mailed on October 6, 2008. No fees are due herewith this Amendment. The Commissioner is hereby authorized to charge any fees that may be required or credit any overpayment to the Deposit Account No. 02-1818. If such a withdrawal is made, please indicate the Attorney Docket No. 115808-481 on the account statement.

Claims 1-49 are pending. In the Office Action, Claims 39-40 and 6-48 are rejected under 35 U.S.C. §102 and Claims 1-49 are rejected under 35 U.S.C. §103. In response, Applicants have amended Claims 1, 15, 21, 23-25, 28, 39, 42-43 and 48 and have canceled Claims 14, 20, 38 and 41. The amendments do not add new matter. In view of the amendments and/or for the reasons set forth below, Applicants respectfully submit that the rejections should be withdrawn.

In the Office Action, Claims 39-40 and 46-48 are rejected under 35 U.S.C. §102(b) as being anticipated by, or in the alternative, under 35 U.S.C. §103(a) as obvious over U.S. Patent No. 4,011,346 to Ernst ("*Ernst*"). Applicants respectfully submit that *Ernst* is deficient with respect to the present claims.

Currently amended independent Claims 39 and 48 recite, in part, pet food products comprising individual pieces of a food product mass having an exterior color comprising a colorant adhered to the exterior surface and selected from the group consisting of water-soluble colorants and oil-soluble colorants. The amendments do not add new matter. The amendments are supported in the specification at, for example, page 3, lines 16-19; page 18, lines 5-6. Applicants have surprisingly found that pet food products can be created having the form of solid, meat-like chunks with random coloring on the surface by using the processes of the present invention. The products of the present invention have a base color and random coloring on at least portions of exterior surfaces that simulate a roasted or grilled appearance that is desirable to consumers. The roasted or grilled appearance is achieved through the addition in situ of colorants to at least portions of exterior surfaces of the product during the production process, "not through the direct application of a heating element to the product." See, specification, page 1, lines 5-9; page 3, lines 2-8. The colorant causes many of the individual pieces to have a portion of the exterior surface darkened as though seared, for example, on an outdoor barbecue grill or any grill with a hot grate that imparts sear marks or dark marks to the piece by burning the surface. Nevertheless, the coloring is not limited to providing a grilled appearance, but may

also be used to add a distinctively different colored layer on the surface of a food product, such as typically provided by marinade. See, specification, page 5, lines 9-21. In contrast, Applicants respectfully submit that the cited references *Ernst* fails to disclose each and every limitation of the present claims. Applicants also respectfully submit that *Ernst* teaches away from the currently amended claims.

Ernst fails to disclose or suggest a pet food product comprising individual pieces of a food product mass having an exterior color comprising a colorant adhered to an exterior surface and selected from the group consisting of water-soluble colorants and oil-soluble colorants as required, in part, by currently amended independent Claims 39 and 48. Instead, *Ernst* discloses treatments for “brown[ing]” the product to give it “grill” marks resembling the type of effect one would obtain if the product were cooked on an open fire over a grill. See, *Ernst*, col. 10, lines 62-66. Further, all of the examples in *Ernst*, Examples 1-4, disclose passing formed patties beneath an “open flame” to “char” the surface of the patties “to impart a charcoal broiled appearance.” See, *Ernst*, col. 12, lines 8-13; col. 13, lines 8-11. As such, *Ernst* explicitly teaches directly applying a heating element to the surface of the product to char the surface of the product. Therefore, because *Ernst* teaches passing the patties beneath a heating element to char the surface of the product, *Ernst* cannot disclose a colorant adhered to an exterior surface and selected from the group consisting of water-soluble colorants and oil-soluble colorants as required, in part, by currently amended independent Claims 39 and 48.

Further, Applicants also respectfully submit that the skilled artisan would have no reason to modify *Ernst* to arrive at the present claims. Instead, Applicants submit that each reference must be considered as a whole and those portions teaching against or away from each other and/or the claimed invention must be considered. *Bausch & Lomb, Inc. v. Barnes-Hind/Hydrocurve Inc.*, 796 F.2d 443 (Fed. Cir. 1986). “A prior art reference may be considered to teach away when a person of ordinary skill, upon reading the reference would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the Applicant.” *Monarch Knitting Machinery Corp. v. Fukuhara Industrial Trading Co., Ltd.*, 139 F.3d 1009 (Fed. Cir. 1998), quoting, *In re Gurley*, 27 F.3d 551 (Fed. Cir. 1994).

As disclosed in *Ernst*, the patties are passed beneath a heating element to char the surface of the product. Indeed, each of the examples in *Ernst* clearly discloses passing formed patties

beneath an "open flame" to "char" the surface of the patties "to impart a charcoal broiled appearance." See, *Ernst*, col. 12, lines 8-13; col. 13, lines 8-11. This is in direct contrast to the present invention where, as is discussed above, the roasted or grilled appearance of the present invention is achieved through the addition in situ of colorants comprising water-soluble colorants and oil-soluble colorants to at least portions of exterior surfaces of the product during the production process, not through the direct application of a heating element to the product. See, specification, page 3, lines 2-8 and 16-19; page 18, lines 5-6. As such, *Ernst* explicitly teaches away from currently amended independent Claims 39 and 48 and the dependent claims that dependent therefrom. Accordingly, Applicants submit that the skilled artisan would have had no reason to modify *Ernst* to arrive at the present claims.

Instead, what the Patent Office has done here is to apply hindsight reasoning by attempting to selectively piece together teachings of each of the references in an attempt to recreate what the claimed invention discloses. On the contrary, the skilled artisan must have a reason to modify the cited references to arrive at the present claims. Applicants respectfully submit that such a reason is not present in the instant case.

Accordingly, Applicants respectfully request that the rejections of Claims 39-40 and 46-48 under 35 U.S.C. §102(b) as being anticipated by, or in the alternative, under 35 U.S.C. §103(a) as obvious over, *Ernst* be reconsidered and withdrawn.

In the Office Action, Claims 1-38 are rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 5,92,504 to Poppel et al. ("*Poppel*"), WO 01/70045 to Saylock et al. ("*Saylock*") and U.S. Patent No. 6,379,738 to Dingman et al. ("*Dingman*") in view of U.S. Patent No. 4,454,804 to McCulloch ("*McCulloch*"). Claims 39-49 are rejected under 35 U.S.C. §103(a) as being unpatentable over *Poppel*, *Saylock*, *Dingman* in view of *McCulloch* and *Ernst*. Applicants respectfully submit that the cited references are deficient with respect to the present claims.

Currently amended independent Claims 1 and 28 recite, in part, processes for producing a pet food comprising disrupting the emulsion in the pressurized zone to form individual pieces or chunks of pet food having irregular exterior surface contours and coloring the exterior surface contours by adhering a colorant to the exterior surface contours in the pressurized zone. The amendments do not add new matter. The amendments are supported in the specification at, for example, page 10, line 20-page 11, line 4; page 16, line 15-page 18, line 15. Currently amended

independent Claims 39 and 48 recite, in part, pet food products comprising individual pieces of a food product mass having an exterior color comprising a colorant adhered to the product and selected from the group consisting of water-soluble colorants and oil-soluble colorants. As discussed above, the products of the present invention may have a base color and random coloring on at least portions of exterior surfaces that simulate a roasted or grilled appearance that is desirable to consumers. The roasted or grilled appearance is achieved through the addition in situ of colorants to at least portions of exterior surfaces of the product during the production process, "not through the direct application of a heating element to the product." See, specification, page 1, lines 5-9; page 3, lines 2-8. The colorant causes many of the individual pieces to have a portion of the exterior surface darkened as though seared, for example, on an outdoor barbecue grill or any grill with a hot grate that imparts sear marks or dark marks to the piece by burning the surface. See, specification, page 5, lines 9-21. In contrast, Applicants respectfully submit that the cited references fail to disclose or suggest every element of the present claims.

With respect to Claims 1-38, *Poppel*, *Saylock*, *Dingman* and *McCulloch* fail to disclose or suggest processes for producing a pet food comprising disrupting the emulsion in the pressurized zone to form individual pieces or chunks of pet food having irregular exterior surface contours and coloring the exterior surface contours by adhering a colorant to the exterior surface contours in the pressurized zone as required, in part, by independent Claims 1 and 28. Instead, *Poppel* discloses emulsion products having a meat-like appearance. The browning of the products is caused specifically by Maillard reactions between amino acids in the plasma and sugars in the whey. See, *Poppel*, Abstract, col. 6, lines 47-50. *Saylock* discloses a pet food having a seared appearance that is thermally-generated. The heat of sterilization promotes reaction of the acid with sugars in the dried, protein rich body. The results of the reaction is seen in a dark non-uniform surface effect on the pieces, akin to searing or charring. See, *Saylock*, page 1, lines 26-28; page 9, lines 26-28. *Dingman* discloses meat emulsion products that include a plurality of linear strands of fiber-like material affording the meat emulsion product a realistic meat-like appearance. *Dingman* fails to even disclose the use of colorants or grill marks. See, *Dingman*, Abstract. *McCulloch* explicitly teaches adding an additive (such as coloring) to the cooked material as the material passes along the length of a tubular extrusion die. The additive is added under a pressure sufficient to deposit the additive in the "interior" of the cooked material. As the

cooked material is forced through the tubular die, the additive begins to migrate outwardly from the interior of the confined material such that the additive diffuses “substantially uniformly throughout the porous structure [of the expanded cooked material], from the center to the surface thereof.” See, *McCulloch*, col. 3, line 40-col. 4, line 34 (emphasis added).

As such, none of the cited references discloses or suggests processes for producing a pet food comprising disrupting the emulsion in the pressurized zone to form individual pieces or chunks of pet food having irregular exterior surface contours and coloring the exterior surface contours by adhering a colorant to the exterior surface contours in the pressurized zone as required, in part, by independent Claims 1 and 28. Indeed, in the specifications of the cited references where “grill” marks are mentioned, none of the “grill” marks are caused by colorants that are adhered to the surfaces of the products. Accordingly, Applicants respectfully submit that the cited references fail to render the present claims unpatentable.

Regarding Claims 39-49, *Poppel*, *Saylock*, *Dingman*, *McCulloch* and *Ernst* fail to disclose or suggest pet food products comprising individual pieces of a food product mass having an exterior color comprising a colorant adhered to an exterior of the product and selected from the group consisting of water-soluble colorants and oil-soluble colorants for substantially the same reasons set forth above with respect to Claims 1-38. The Patent Office asserts that *McCulloch* teaches injecting a color into the pet food product and cites *Ernst* as teaching that after the final product has formed, it can be treated to give “grill marks.” See, Office Action, page 4, lines 1-5. However, as discussed above, *McCulloch* explicitly teaches adding an additive (such as coloring) to the cooked material as the material passes along the length of a tubular extrusion die. The additive is added under a pressure sufficient to deposit the additive in the “interior” of the cooked material. As the cooked material is forced through the tubular die, the additive begins to migrate outwardly from the interior of the confined material such that the additive diffuses “substantially uniformly throughout the porous structure [of the expanded cooked material], from the center to the surface thereof.” See, *McCulloch*, col. 3, line 40-col. 4, line 34 (emphasis added). As such, *McCulloch* cannot disclose or suggest a food product mass having an exterior color comprising a colorant adhered to an exterior of the product and selected from the group consisting of water-soluble colorants and oil-soluble colorants as required, in part, by independent Claims 39 and 48. *Ernst* fails to remedy this deficiency because, as discussed above, *Ernst* clearly discloses passing formed patties beneath an “open flame” to

"char" the surface of the patties "to impart a charcoal broiled appearance." See, *Ernst*, col. 12, lines 8-13; col. 13, lines 8-11. Therefore, Applicants respectfully submit that *Poppel*, *Saylock*, *Dingman*, *McCulloch* and *Ernst* fail to disclose or suggest pet food products comprising individual pieces of a food product mass having an exterior color comprising a colorant adhered to an exterior of the product and selected from the group consisting of water-soluble colorants and oil-soluble colorants as required, in part, by independent Claims 39 and 48.

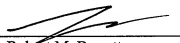
Accordingly, Applicants respectfully request that the rejections of Claims 1-38 under 35 U.S.C. §103(a) as being unpatentable in view of *Poppel*, *Saylock*, *Dingman* and *McCulloch* and Claims 39-49 under 35 U.S.C. §103(a) as being unpatentable in view of *Poppel*, *Saylock*, *Dingman*, *McCulloch* and *Ernst* be reconsidered and withdrawn.

For the foregoing reasons, Applicants respectfully request reconsideration of the above-identified patent application and earnestly solicit an early allowance of same. In the event there remains any impediment to allowance of the claims that could be clarified in a telephonic interview, the Patent Office is respectfully requested to initiate such an interview with the undersigned.

Respectfully submitted,

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